

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2119.

708
1910

No. 12, SPECIAL CALENDAR.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

WALTER J. GREGORY.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 10, 1910.

April 11-1910

Shepard

Court of Appeals, District of Columbia

JANUARY TERM, 1910.

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No. 6 Special Calendar

April Term 1910

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In the Court of Appeals of the District of Columbia.

No. 2119.

DISTRICT OF COLUMBIA, Plaintiff in Error,
vs.
WALTER J. GREGORY.

a No. 348701.

In the Police Court of the District of Columbia, December Term,
1909.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Information for Violation of Law Relating to Gift Enterprise.

Be it remembered, that in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 Bill of Exceptions.

Filed Jan. 28, 1910. F. A. Sebring, Clerk Police Court, D. C.

In the Police Court of the District of Columbia.

No. 348701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Be it remembered that at the trial of this cause, which came on for a hearing on the twenty-eighth day of December, A. D. 1909, before the Honorable Alexander R. Mallowny, one of the Judges of the Police Court of the District of Columbia, upon the following information, to wit:

In the Police Court of the District of Columbia, December Term,
A. D. 1909.

THE DISTRICT OF COLUMBIA, ss:

James L. Pugh, Jr., Esq., Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that Walter J. Gregory, late of the District aforesaid, on the First day of November in the year A. D. nineteen hundred and nine, and on divers other days and times between the said first day of November and the twentieth day of December in the year nineteen hundred and nine, in the City of Washington and in the District of Columbia aforesaid, did engage in the business of a gift enterprise; contrary to and in violation of Sec. 1177 of the Revised Statutes Relating to the District of Columbia, and constituting a law of the District of Columbia.

JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared J. E. Armstrong, this 28th day of December, A. D. 1909, and made oath before me that the facts set forth in the foregoing information are true.

[SEAL.]

J. B. PEYTON,
*Deputy Clerk Police Court
of the District of Columbia.*

The following agreed statement of facts was filed, to wit:

2 In the Police Court of the District of Columbia.

No. 348701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Agreed Statement of Facts.

It is hereby agreed between the District of Columbia and the defendant Walter J. Gregory that the following may be considered by the court as having been offered in evidence, duly proven, and shall have the same force and effect as if credible witnesses had duly testified thereto under oath. Either party reserving the right to object to the relevancy or materiality of any of said facts so agreed upon.

The defendant Walter J. Gregory is the managing officer of The Sperry & Hutchinson Company, a private corporation organized under the laws of the State of New Jersey, and having its principal office in Jersey City, in said State. Said Company has a paid up capital of one Million Dollars, and a surplus of over Two Hundred and Fifty Thousand Dollars.

The defendant Walter J. Gregory conducts the business of said corporation in the District of Columbia and is not engaged in any other business in said District of any other sort whatsoever, and said business is conducted by said defendant in accordance with the contract stamps, stamp-books, tokens, catalogues, matters therein contained, as hereinafter set out, and the other facts hereinafter set-forth.

That on, to wit, the 14th day of Sept., 1909, the defendant entered into a contract with Harry E. Haigley trading as the Haigley Ptg. Co., a merchant in the City of Washington, District of Columbia, which is as follows:

Opening Advertising Contract.

Washington, D. C.

This Agreement, made the 14th day of Sept., 1909, by and between Haigley Ptg. Co., Merchant, engaged in the Printing and Stationery Supplies business at No. 1915 Pa. Ave. N. W., Street, Washington, D. C. (hereinafter called the Subscriber), and The Sperry and Hutchinson Company, a corporation of the State of New Jersey (hereinafter called the Company), Witnesseth:

Whereas, the Subscriber desires to advertise his business and increase his cash trade by giving to his cash-paying customers a rebate or discount upon small payments in cash; and desires to furnish such cash-paying customers with tokens of such payments, in the form of adhesive stamps, which in certain numbers shall entitle said customers to receive such rebate in cash or merchandise; and, whereas, said objects can be best accomplished by co-operation with other merchants, Subscribers to this agreement, and through the services of said Company;

Now, Therefore, it is understood and agreed by and between the parties hereto, in consideration of the mutual promises and agreements hereinafter contained, as follows:

Said Company agrees to print and distribute throughout the City of Washington at least fifty thousand directories containing the names, business and business addresses of the Subscribers to this agreement; and also to print and distribute an equal number of booklets to be known as "Trading Stamp Books," with pages ruled off for the convenient insertion therein of said rebate tokens or stamps when issued by said Subscriber; also to furnish said Subscriber with a sufficient number of said tokens or stamps to enable the Subscriber to issue one stamp for each ten cents paid by his cash customer, said stamps to be marked with a series letter and number devoted exclusively to said Subscriber; and also to furnish said Subscriber with metal and card advertising signs for display in and about his store, informing the public that said Subscriber gives said stamps to his customers.

Said Company agrees to redeem said stamps in cash (at the rate of ten cents per hundred), or in the general merchandise carried by the Company, at the option of the person presenting them for redemption, provided such person has received the same from the Company's Subscribers upon cash payments for goods purchased,

and subject to the conditions herein and in said Trading Stamp Books.

Said Subscriber agrees to order and receive from said Company said stamps in lots of not less than one pad per lot, each pad containing one thousand stamps, and to pay upon delivery for the use thereof as an advertising medium, and for the services rendered by said Company, the sum of 3 50/100 dollars per pad; and agrees to offer to customers upon making purchases, and to give when accepted by them, as an inducement for cash trade, and for redemption only by said Company, one of said stamps for each and every ten cents (10c.) represented in the retail price of goods for which cash is paid by said customer, as a token of such payment and as a rebate or discount; and agrees not otherwise to use, procure or dispose of said stamps, without the written consent of said Company.

The Subscriber further agrees to display prominently in the windows and upon the exterior of his store the advertising signs furnished by said Company, and agrees to advertise *We give "S. & H." Green Trading Stamps* in all newspaper and other advertisements published by or for him, and agrees not to use any other vouchers, premium tokens, stamps or similar devices during the term of this agreement.

It is Mutually Agreed between the parties hereto that the property in and title to said stamps and advertising signs shall remain in said Company, and shall not in any event pass to said Subscriber or any other person, firm or corporation, the purpose of said stamps being to identify to said Company the cash-paying customers of its Subscribers, who may be entitled to the discount redemption thereof as aforesaid.

This Agreement shall remain in force for one year from the date of its taking effect, and shall renew itself for an equal period from year to year, unless written notice to the contrary be given by either party to the other at least thirty days prior to the yearly periods of expiration; and in case such notice be given said Company may thereafter omit from its subsequently printed directory and advertisements the name of said Subscriber.

It is Mutually Understood and Agreed that this contract is made for the benefit of the Subscriber's customers as well as of the parties hereto.

This Agreement shall take effect upon the opening of the Company's store in Washington.

In witness whereof, the parties hereto have executed the foregoing agreement the day and year above written.

THE SPERRY AND HUTCHINSON
COMPANY,
By WALTER J. GREGORY.
HARRY E. HAIGLEY, *Subscriber*.

N. B.—No agent has authority to alter the foregoing printed form of agreement in any way. No alteration or addition thereto shall be effective unless countersigned by an officer of the Company at the Home Office, Nos. 30-34 West 33d Street, New York City.

4 This contract is still in force, and said defendant, on behalf of said Company, has heretofore entered into other similar agreements with numerous other merchants in said City and District, and more than two hundred and fifty of such contracts are now in effect.

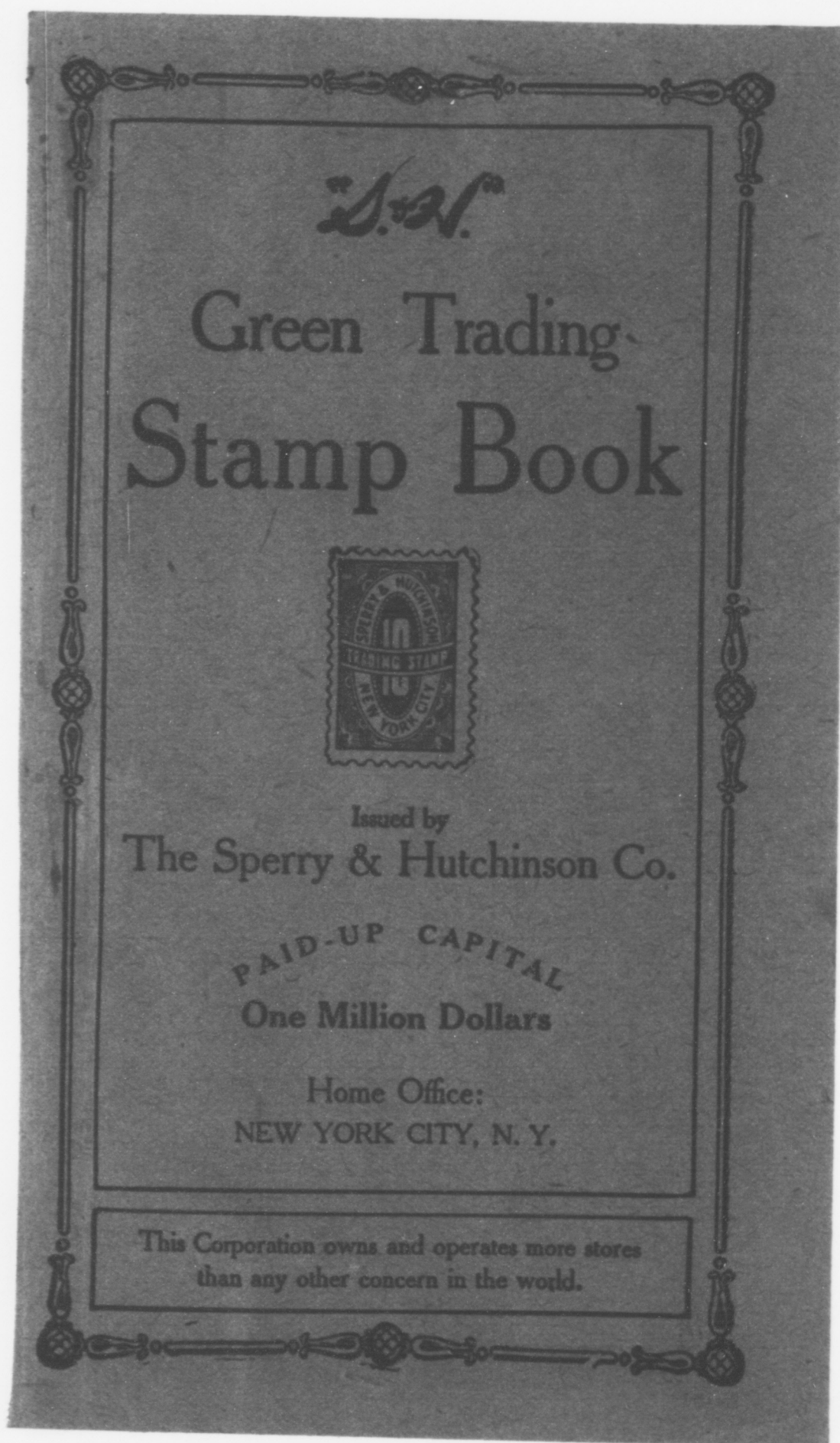
The tokens or stamps referred to in said contract are as follows:



On the back of each of said stamps the following appears, viz:

Property of The Sperry
& Hutchinson Co. Not
transferable except as
provided in notice in
Trading Stamp Book.

The first page of said stamp book reads as follows:



5

The second page of said stamp-book reads as follows:

TO enable you more quickly to fill your book, we have made arrangements to give you stamps for soap wrappers, trade marks, coupons, tags, labels, etc., etc. For example, the trade marks from Lion Coffee and Arbuckle Coffee; the labels from several brands of Condensed Milk; the labels from Wilson's Whiskey; the coupons of the American Tobacco Co.; the certificates of the United Cigar Stores Co., are a few of the many we will accept in exchange for *J. N.* Green Trading Stamps. Study the list!

The stamps you get in this way, combined with those your merchants should give you with your purchases, make it very easy to fill books rapidly and obtain valuable "Premiums."

You cannot possibly appreciate the Value and Variety of the merchandise we give as "Premiums" without visiting our Premium Parlor. You will find there practically everything, and the Best of everything, required in any home; all to be had, free of cost, for *J. N.* Green Trading Stamps.

On the last page, but one, of said stamp-book occurs the following:

Name _____

Address _____

Article _____

REDEEMED BY

M _____
(CLERK'S NAME)

Date _____

No. of Book _____

7 On the last page of said stamp-book is printed the following:

"Notice

To the Public and to the Customers of Our Subscribers.

This book and the trading stamps which are issued by the undersigned are so issued, and are received by you, pursuant to certain restrictions and limitations concerning their use contained in the written contracts made for your benefit between the undersigned and the merchants authorized to re-issue them to their customers. Neither the books nor the stamps are sold to you or the merchant, the title thereto being expressly reserved in the undersigned. They are furnished to you as evidence of payments to our subscribers. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any other use of them without our consent in writing. We will in every case, where application is made to the undersigned, give you permission to turn over your stamps to any other bona-fide collector of 'S. & H.' Green Trading Stamps; but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book, and personally derive the advantage and benefit of exchanging it for your choice of the many useful and valuable articles supplied by us.

These stamps when received by you must be pasted in the book, as that is a method we have adopted for the purpose of preventing their further use as an advertising medium. Our stamps and premiums are restricted, except as above, to our subscribers and their customers.

THE SPERRY & HUTCHINSON
COMPANY,
THOMAS A. SPERRY, *President.*

Paid up Capital, \$1,000,000.00.

This book is loaned to

Name
Address"

On the back of the said trading stamp-books the following circular is pasted, viz:

NOTICE TO THE PUBLIC

J.N. Green Trading Stamps, the soundest and most equitable of all co-operative profit sharing plans, represent a cash discount on your cash payment, which by contract with our subscribers, we have agreed to pay you.

Our Subscribers in various lines of trade co-operate with each other to give to their customers the same *J.N.* Green Trading Stamp, thus enabling you to get a discount on all your purchases.

By trading with our Subscribers and paying cash, you will receive this discount, and thus co-operate with them, and with us, in our effort to build up their cash business.

Ask for *J.N.* Green Stamps on all cash purchases.


Call at our store, No. 1422 Pennsylvania Avenue, and see the splendid line of goods representing the discount in merchandise to which *J.N.* Green Trading Stamps entitles you; or, if you prefer, you may exchange those issued in Washington, D. C. for cash at the rate of one cent for ten stamps.

9


On the third page of said trading stamp books occur the following:

ISSUED NOV. 15, 1909.
Reissued from time to time as changes occur

**DIRECTORY OF
MERCHANTS**
IN
WASHINGTON, D. C.
and Vicinity



WHO
GIVE



"S.H."

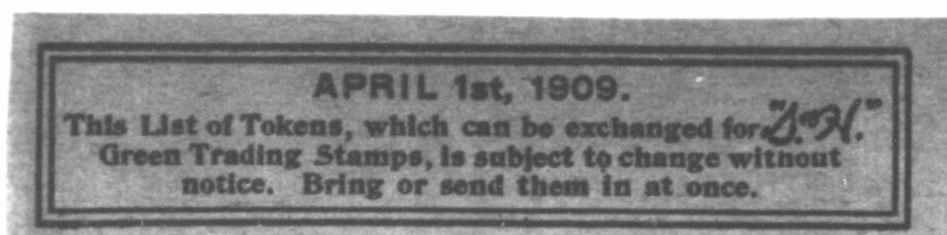
Green Trading Stamps
WITH ALL CASH SALES
WHEN ASKED FOR

LOCAL BRANCH
1422 PENNSYLVANIA AVENUE
WASHINGTON, D. C.

THE
SPERRY & HUTCHINSON CO. Prop.
THOS. A. SPERRY, President
PAID-UP CAPITAL, \$1,000,000.00

Following this third page are fourteen pages of directory giving names and addresses of merchants in the District of Columbia and Hyattsville, Maryland, classified by the kinds of merchandise in which they deal.

This list is followed by fifteen pages under the following heading, viz:



The list of tokens includes coupons, trade-marks, labels soap wrappers, box covers, tobacco tags, &c., from various classes of merchandise, and are arranged as follows:

COFFEES

"A1" Blend.....	2	"	1 coupon
Arbuckle's Coffee.....	1	"	1 signature
Autocrat Coffee.....	1	"	1 coupon
Blanke's "World's Fair Line" Coffee, coupon and center figure from front of package with 20c. cut out of package.....	1	"	2 "
With 25c.....	1	"	1 "
" 30c.....	2	"	1 "
" 35c.....	3	"	1 "
" 40c.....	4	"	1 "
" 45c.....	5	"	1 "
Boardman's Crest Coffee.....	1	"	2 whole coupons or value thereof
Putnam Coffee.....	1	"	
Gold Star Coffee.....	1	"	
C.F. Bonsor & Co "Perfection Brand".....	1	"	5 "
Climax Coffee.....	1	"	2 "
"Elite" (or the value thereof).....	2	"	1 "
German-American Coffee.....	1	"	1 Whole Libr'y Slip or value thereof
"Golden Staff" (or value thereof).....	2	"	for 1 coupon
"Highland" (or value thereof).....	2	"	1 "
"Karang" Java Coffee (whole check or the value thereof).....	1	"	1 pr's'nt check
Lion Brand Coffee.....	1	"	1 trade mark
Montague Extra Blended Coffee.....	1	"	2 coupons
"National" (or the value thereof).....	2	"	1 "
"New Era" (or the value thereof).....	2	"	1 "
"Ourico" Coffee.....	1	"	2 "
Quick Snap Coffee put up by John Bowen, Allentown, Pa.....	1	"	1 bag front
Royal Blend.....	1	"	1 coupon
Leader.....	1	"	1 coupon
Star Coffee.....	1	"	1 coupon
Sphinx Blended Coffee.....	2	"	1 "
Union Club Coffee.....	1	"	1 "

CONDENSED MILK

Autocrat Condensed Milk.....	1	"	3 labels
Banner Condensed Milk.....	1	"	1 "
Blue Label Condensed Milk.....	1	"	3 "
Darling Milk.....	1	"	3 "
Dr. F. W. Lange's Lactated Tissue Food.....	1	"	1 "
Lion Brand Evaporated Cream.....	1	"	4 "
Lion Brand Condensed Milk.....	1	"	2 "
Montague Absolutely Pure Con- densed Milk.....	1	"	2 "
Nestle's Condensed Milk.....	1	"	2 "

In said trading stamp books there next follows thirty-three pages ruled off into thirty oblong spaces each, otherwise blank.

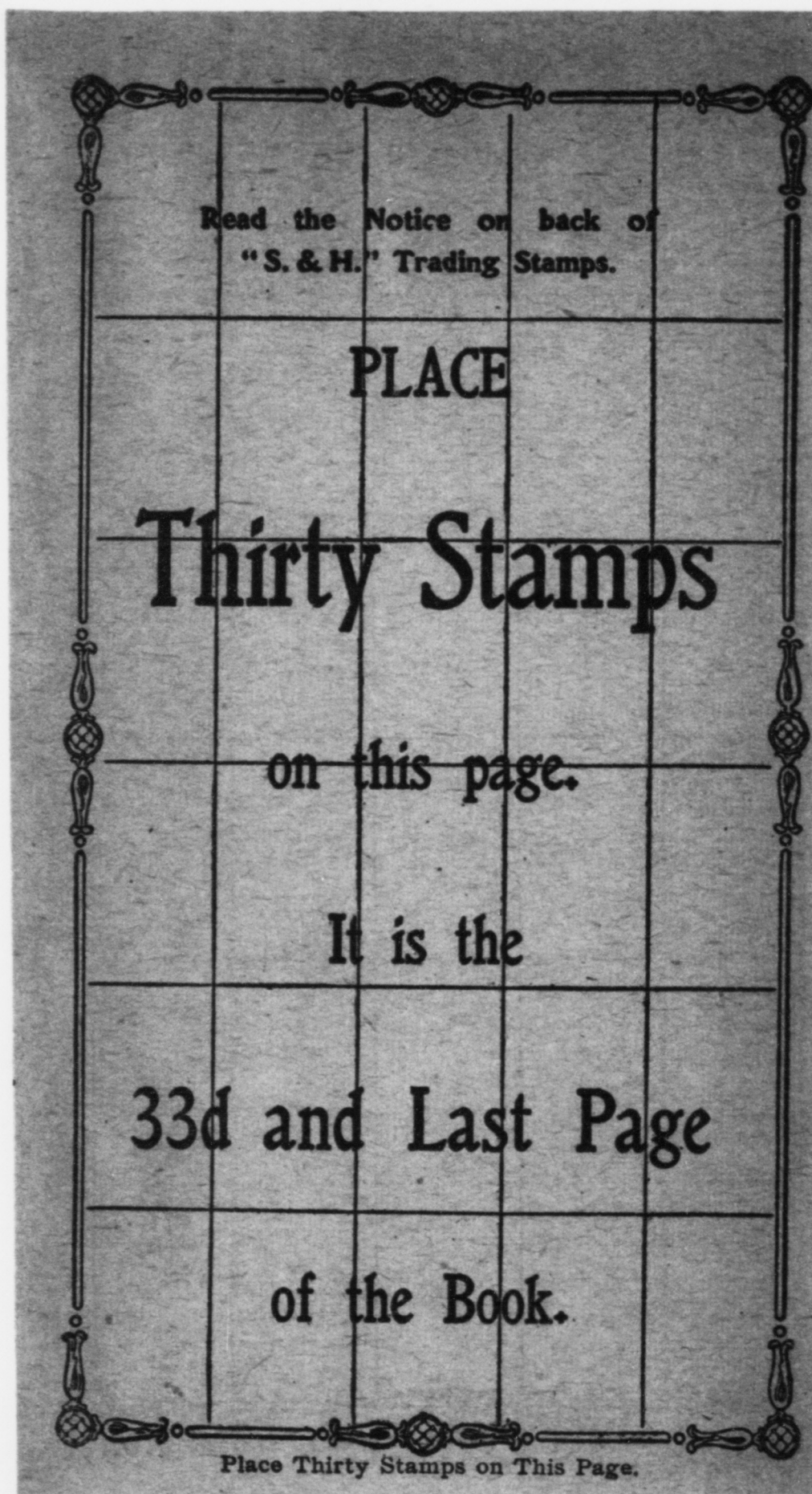
At the bottom of each of said ruled pages the following appears:

"Place thirty stamps on this page."

11 On the first of these thirty-three pages there is pasted a sheet representing fac similies of the faces of thirty of said trading stamps upon which said sheet the following is printed, viz:



On the last of said thirty-three pages, over the ruled spaces, the following is printed:



The metal and card advertising signs referred to in said contract are made of sheet steel and card-board respectively, and are furnished by said Company to merchants under contract with it, for display inside and outside their stores. Upon said signs appear the words:

"We give 'S. & H.' Green Trading Stamps
Ask for them."

13 Said defendant and said Company maintain at No. 1422 Pennsylvania Avenue, Northwest, Washington, District of Columbia, a store and basement in which are exhibited various articles of housefurnishing merchandise, consisting of tables, desks, chairs, beds, mirrors, pictures, rugs, curtains, blankets, silverware, solid gold jewelry, plated ware, cut-glass, musical instruments, carpet sweepers, tennis rackets, baseballs, clubs, fishing tackle, smokers' articles, &c. &c., the value of which exceeds \$5,000.

Each of said articles bears a tag upon certain of which appears the following:

"This Premium Given Free
in Exchange for
One Book
Filled with the
Sperry and Hutchinson
Green
Trading Stamps."

Some of said articles have tags showing that they are given for one book or two books or three or four or five and up to ten books, but no article is so labeled as to show that it will be exchanged except for one full book of 990 stamps, or exact multiple thereof.

Said merchandise is carried by said Company for the redemption of its Trading Stamps when presented, and none of it is sold or for sale.

In addition to said articles of merchandise, said company carries a stock of Falcon Pens and cash for the redemption of such of its said stamps as may be presented for redemption in cash or in pens, and nothing else is exchanged except for a full book of 990 stamps or exact multiple thereof.

14 The store of said company is open during the business hours of each day for the exhibition of said merchandise and for the redemption of said stamps. At said store are catalogues containing over forty pages of illustrations of the articles carried in said store. These catalogues are distributed free to the public. They show over three hundred different classes of articles, and clearly indicate the number of books of stamps required for each article, and no article is there listed for exchange except for a full book of 990 stamps or exact multiple thereof.

The retail value in Washington of the average article given in change for one book of trading stamps is about \$2.25, and the same proportionate rate of retail value is maintained for articles given in exchange for more books than one of said stamps.

Said company also employs large numbers of canvassers who go from house to house in the District of Columbia and endeavor to induce householders to trade with and pay cash for purchases to the merchants who have entered into said contracts with said company, and who leave with householders various advertising matter, including said trading stamp books, circulars, &c. &c.

Said company also prepares attractive circulars for the merchants

under contract with it, for the advertisement of their business in connection with the issuance of said trading stamps.

The amount charged for said stamps under said contracts
15 is \$3.50 per single thousand, \$3.32 per thousand in lots of 5,000, and \$3.00 per thousand in lots of 25,000 or more. Said company does not charge for said trading stamp books, trading stamp signs, canvassing, circularising, merchandise or cash given for stamps.

Defendant and said company have been engaged in said business in the District of Columbia continuously from the 20th day of April, 1909, and from that date to November 1, 1909, 3,755,457 stamps have been furnished to merchants under said contracts, and during said period said company has redeemed in Washington, District of Columbia, 421,750 of said stamps.

Said company is engaged in said business in twenty-seven States of the United States, and its trading stamps issued in the District of Columbia or in any State are redeemable in merchandise only in the stores of the Company in any other State where it carries on business. Many of the stamps issued in Washington, D. C. have been so redeemed in Baltimore, Maryland, and many there issued have been so redeemed in Washington, District of Columbia.

The defendant and the Sperry and Hutchinson Company are not engaged in the business of selling and do not sell any goods, wares, or merchandise and do not sell or offer to sell anything whatsoever except the said coupons under the contract above set out. The stock of goods above mentioned is not for sale and no part of the same has been sold at any time nor offered for sale.

16 The defendant and The Sperry & Hutchinson Company have no contractual or other relation of any sort whatsoever directly with the purchasers of goods from merchants, except as contained in the above-mentioned contract and the notices and other printed matter contained in said Trading Stamp Books, Catalogues, &c.

It is further agreed that neither party will take any advantage of the absence of the contracting merchant as a party defendant in this proceeding.

It is further agreed that each customer who receives said stamps, is entitled to the redemption thereof in cash in any number at the rate of 1¢ for 10 stamps, and in pens at the rate of 1 pen for each stamp, or in general household merchandise, as above set forth, in lots of 990 stamps.

It is hereby stipulated that this agreed statement of facts shall be considered as a part of the information in this case and that the defendant shall file a motion to quash the information and the cause will be heard on said motion.

E. H. THOMAS,
Corporation Counsel.
A. S. WORTHINGTON,
Attorney for Defendant.

17 Thereupon the defendant, by his counsel, A. S. Worthington, Esquire, filed the following motion to quash said information, to wit:

In the Police Court of the District of Columbia.

No. 348701.

DISTRICT OF COLUMBIA

vs.

WALTER J. GREGORY.

Now comes the defendant pursuant to the last clause of the paper filed in this cause called agreed statement of facts, and moves the Court to quash the information in this case.

A. S. WORTHINGTON,
Attorney for Defendant.

After hearing argument of counsel on said motion the Court, afterwards, to wit: on the twenty-seventh day of January, A. D. 1910, sustained said motion to quash the information and discharged the defendant in the following opinion, to wit:

18 In the Police Court of the District of Columbia.

Information No. 348701.

DISTRICT OF COLUMBIA

vs.

WALTER J. GREGORY.

This is a motion to quash an information charging the defendant in general terms with engaging in a certain gift enterprise. Congress by Act approved February 17, 1863, entitled: "An Act Prohibiting Gift Enterprises in the District of Columbia" which declared that so much of the act of the Legislature Assembly as Authorized gift enterprises therein and licenses to be issued, therefore, is disapproved and repealed and thereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise. The act is brought forward in the R. S. D. C. as Section 1176 and Section 1177 provides that "any person who shall in any manner engage in any gift enterprise business in the District shall on conviction thereof pay a fine not exceeding one thousand dollars or be imprisoned in jail not less than one nor more than six months or both in the discretion of the Court.

The Act of the Legislature Assembly defining gift enterprises is as follows:

"The proprietors of gift enterprises shall pay one thousand dollars annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any

ticket of admission to any exhibition or performance, or other place of amusement, with a promise, express or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall
19 be for individual gain or for the benefit of any institution, of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise."

Congress undoubtedly has the power to pass statutes regulating matters affecting the public health, safety, peace and morals of the District of Columbia and it is only where statutes have no real or substantial relation to those objects or is a palpable invasion of the rights secured by the fundamental law, that courts will declare them void.

(D. C. vs. Lansburgh, Appl. 512.)

In *Denver vs. Frueaff*, 39 Col. p. 20, the Court in holding an ordinance defining gift enterprise unconstitutional said:

"Such definitions are subject to review by the courts as to whether or not when making the same the legislative body has acted within its power and prerogatives as limited by the Constitution. The test of the limit is to be found in the definition of the police power which may be exercised by legislative bodies regulating the conduct of business of others. They can only do so where the business regulated interferes with the public health, public morality or safety. It cannot be for a moment contended in this case that the business interferes with any of these things unless it be with the public morality and it would only interfere with the public morality in case it can be successfully shown that the business involves those elements of chance involved in lotteries and gambling. As I said before I cannot see any such element of chance in this business and if there be no such element in it it cannot possibly interfere with the public morals and if it does not the city council has no power from any source to prohibit it. If this were not true there would be no safeguards to the liberty of the citizen or his rights to engage in lawful enterprises, or bring about a wholesome competition in business that tends rather to public necessity than to the contrary."

In the trading stamp case of the District of Columbia vs. Lansburgh, Chief Justice Shepard in passing upon the Act of the Legislative Assembly defining gift enterprises used this language:

"We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under con-
20 sideration might or might not apply to actual merchants in the ordinary course and practice of competitive business or to determine just what character of inducements by way of gift or premium may, and may not, be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers may be regarded as certain; and the exercise of such power would doubtless be denied if expressly attempted. Nor can it with reason be said to apply to bona fide co-operative associations and the like. It is possi-

ble also that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift is not the real object of the sale." * * *

And on page 526 lays down the following rule of construction applicable to an interpretation of the statute:

"It would not follow necessarily that the statute should be stricken down in its entirety, because it may be susceptible of an unconstitutional application in certain cases that may possibly arise. This is not reasonable nor is it in accordance with the rule of interpretation adopted by the Supreme Court of the United States applied to a statute good on its face but where by reason of its general and comprehensive terms it may be made by construction to apply to objects forbidden by the Constitution. In such case the statute will be allowed its full force and operation as applied to all cases rightfully and constitutionally within its provision, but application will be restrained as to those objects simply to which the statute is forbidden to extend."

The conclusion, therefore, is that the scope of this act defining gift enterprises is so broad that it not only forbids matters of common right, beyond the power of Congress to prevent under the guarantees of the Constitution, but also those matters which under the police power congress clearly has the right to define, prohibit and punish. The question is, does the statement of facts disclose such a scheme of business, where the sale of a lawful article is accompanied by a gift of something specific and certain not attended with any element of chance and where the gift is not the real object of the sale,
21 beyond the power of Congress to prohibit under the limitations of the Constitution and therefore, not within the provisions of the statute.

The defendant is the manager of the Sperry and Hutchinson Company, a private corporation with stores and places of business in twenty-seven states. Said business is conducted in accordance with a contract entered into between the defendant and different merchants of the city. These merchants desiring to increase their cash receipts and cash paying customers give a rebate or discount upon small payments in cash by giving to each cash paying customer a stamp which he purchases from the defendant at the rate of \$3.50 per one thousand. The merchant gives one stamp for each ten cent sale of merchandise. These stamps are redeemed in cash or merchandise at any of the stores of the corporation in which are exhibited different articles bearing a tag showing just what will be given for each book of stamps. Each stamp may be redeemed for one falcon pen, ten stamps for one cent, one hundred for ten cents and nine hundred and ninety stamps for \$1, or merchandise of the average retail value of \$2.50. The defendant also agrees to advertise the stores of the merchants by canvassers who are to go from house to house and who are to distribute at least fifty thousand directories containing their names and business addresses and also to distribute an equal number of trading stamp books and to furnish attractive signs, circulars, pamphlets and catalogues in connection with the issuance of said trading stamps.

It will be noticed that the business of the defendant is different in several very essential particulars from the Lansburgh case. (1) The stamps issued by the defendant are redeemable in any number from one upward, while those in the Lansburgh case were redeemable only in lots of nine hundred and ninety. (2) The stamps issued by the defendant are redeemable one stamp for a Falcon pen or in cash at the rate of one cent for ten stamps, ten cents for one hundred stamps and one dollar for nine hundred and ninety stamps, while those in the Lansburgh case were not redeemable in any cash payment; and (3) the stamps of the defendant are by the terms of the contract under which they are issued discounted by the merchant to his customers on small payments in cash, while the contract in the Lansburgh case did not so provide.

In the defendant's scheme or plan of business, therefore, there is no element of chance, no appeal to the gambling instinct or anything by which the morals of the community may be affected. At most it might be termed an ingenious device which holds out to the individual customer a way to get something for nothing, but he knows as soon as he is given a stamp, what it can be redeemed for and by inspecting the catalogues or resorting to the premium stores he sees on exhibition the articles tagged which are obtainable by him in exchange for his book of stamps before or after the book is full or obtain their redeemable cash value. It is true a great many stamps may never be redeemed which would be to the profit of the defendant. But this is not his fault. The object of the contractual relation between the merchant and the defendant has been accomplished. The defendant is ready at any time in the future to redeem the stamps for a sum certain or for an article of fixed value and has brought to the merchant a cash paying customer at the small discount of three and one half per cent. On the part of the merchant his business is advertised by circulars, directories and canvassers; new customers are attracted and the old retained, his trade is enlarged and his cash receipts increased.

In *State vs. Ramseyer* 73 N. H. 40 the Court said:

"The Legislative prohibition of a business not harmful to society in any of its essential features, though comparatively novel and peculiar, cannot receive judicial sanction merely because the prohibited business stimulates competition among merchants in disposing of their wares, or affords an unusual method for commercial advertising.

23 In the *Sperry and Hutchinson Company vs. Temple* (137 Federal Reporter, 992) which was a trading stamp case of the defendant company, the Court uses this language:

"The trading stamp business is essentially legitimate, and so far as the Court can discover it is the only way in which the small purchaser practically obtains a discount for immediate payment, whether that immediate payment is in cash or anything else. * * * So far as this case is concerned the Court is unable to perceive from any proof in the record, or from any suggestion that the business of

the complainant is not perfectly legitimate which the legislature has no right to obstruct."

The Sperry & Hutchinson Co. vs. Weber 161 Fed. 219.

Ex Parte Hutchinson 137 Fed. 950.

The Sperry & Hutchinson Co. vs. Brady 134 Fed. 691.

State vs. Shugart 138 Ala.

Ex Parte McKenna 126 Cal. 429.

People vs. Dycker 72 Appl. N. Y. 308.

State vs. Dalton 22 R. I. 77.

Young vs. State 101 Va. 853.

State vs. Beeson 135 N. C. 271.

State vs. Dodge 76 Vt. 197, 204.

In the State vs. Session 178 Mass. 578, which was a stamp case specifically prohibiting the use of trading stamps, Justice Holmes, (now of the Supreme Court of the United States) said:

"These stamps are given to the purchaser of goods from the merchant and are taken to the store of the stamp company, where they are exchanged for one of a large number of articles that the purchaser may select. These articles are on exhibition all the time, and are of sound value, and the number of stamps necessary to obtain an article is indicated on the article. These articles consist mainly of furniture and household utensils. The value of the article given in exchange for stamps varies in accordance with the number of stamps offered for exchange. In the present case twenty-five stamps were offered in exchange, and a cup and saucer were given by the stamp company for twenty-five stamps. The specific subject of the sale was the hair brush, and the stamps were delivered as a bonus. The merchants who give stamps for cash trade, display signs in their windows to that effect. Every purchaser knows what he is buying, and can select at the store of the stamp company even before his purchase from the merchant who gives stamps, the article that he wants to exchange for the stamps which are given with the article purchased. * * *

24 So far as appears there was no gambling element in the defendant's transaction and his acts were not prohibited by law."

In State vs. Dalton 22 R. I. 77, The Court used this language:

"The thing sought to be accomplished by the vendor is the sale of his goods by means of the inducement held out to the purchaser in the form of a premium and if he may himself give and deliver the premium as he clearly may, he may also give it through a third party. * * * For as already intimated, it can make no possible difference that the article given away with the sale is delivered to the purchaser by a third person instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen both of our State Constitution and also by the fourteenth amendment of the Constitution of the United States."

My opinion, therefore, is that the business of the defendant is not

within the prohibition of the statute and the motion to quash the information is granted.

ALEX. R. MULLOWNY,
Judge Police Court.

25 Whereupon Counsel for the District of Columbia excepted to the rulings of the Court on matters of law, which exceptions were duly noted by the Court upon his minutes, and thereupon the District of Columbia, by James L. Pugh, Jr., Esquire, Assistant Corporation Counsel, gave notice in open court at the time of said rulings of its intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

The District of Columbia, by its said counsel, therefore prays the Court to settle, sign and seal this its bill of exceptions, which is accordingly done *nunc pro tunc* this 28th day of January, A. D. 1910.

ALEX. R. MULLOWNY, [SEAL.]
Judge of the Police Court of the District of Columbia.

26 (Copy of Docket Entries.)

In the Police Court of the District of Columbia, December Term,
A. D. 1909.

No. 348701.

DISTRICT OF COLUMBIA

VS.

WALTER J. GREGORY.

Information for Violation of Law Relating to Gift Enterprise.

Wednesday, December 29, 1909.—Agreed statement of facts filed with information.

Motion to quash information filed, argued and submitted.

January 27, 1910.—Motion to quash information sustained and defendant discharged.

Exceptions taken to the rulings of the Court on matters of law and notice given in open court, by the Assistant Corporation Counsel on behalf of the District of Columbia, at the time of said rulings, of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

January 28, 1910.—Bill of exceptions presented, settled, signed, sealed and filed.

January 31, 1910.—Writ of error received from the Court of Appeals of the District of Columbia.

27 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, N. C. Harper, Deputy Clerk of the Police Court of the District of Columbia, acting in the absence of the Clerk, do hereby certify that the foregoing pages, numbered from 1 to 26 inclusive, to be

true copies of originals in cause No. 348701 wherein the District of Columbia is plaintiff and Walter J. Gregory — defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, — the City of Washington, in said District, this 9th day — February, A. D. 1910.

[Seal Police Court of District of Columbia.]

N. C. HARPER,
Deputy Clerk Police Court, Dist. of Columbia.

[Endorsed:] No. 348701. District of Columbia vs. *William B. Kraft*. Transcript of Record.

28 Filed Jan. 31, 1910. F. A. Sebring, Clerk Police Court.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable A. R. Mulloony, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, plaintiff, and Walter J. Gregory, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 31st day of January, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

SETH SHEPARD,

*Chief Justice of the Court of Appeals
of the District of Columbia.*

Endorsed on cover: District of Columbia Police Court. No. 2119. District of Columbia, plaintiff in error, vs. Walter J. Gregory. Court of Appeals, District of Columbia. Filed Feb. 10, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA

FILED
APR 13 1910

Henry W. Hodges,
clerk.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2119.

No. 6, SPECIAL CALENDAR.

DISTRICT OF COLUMBIA

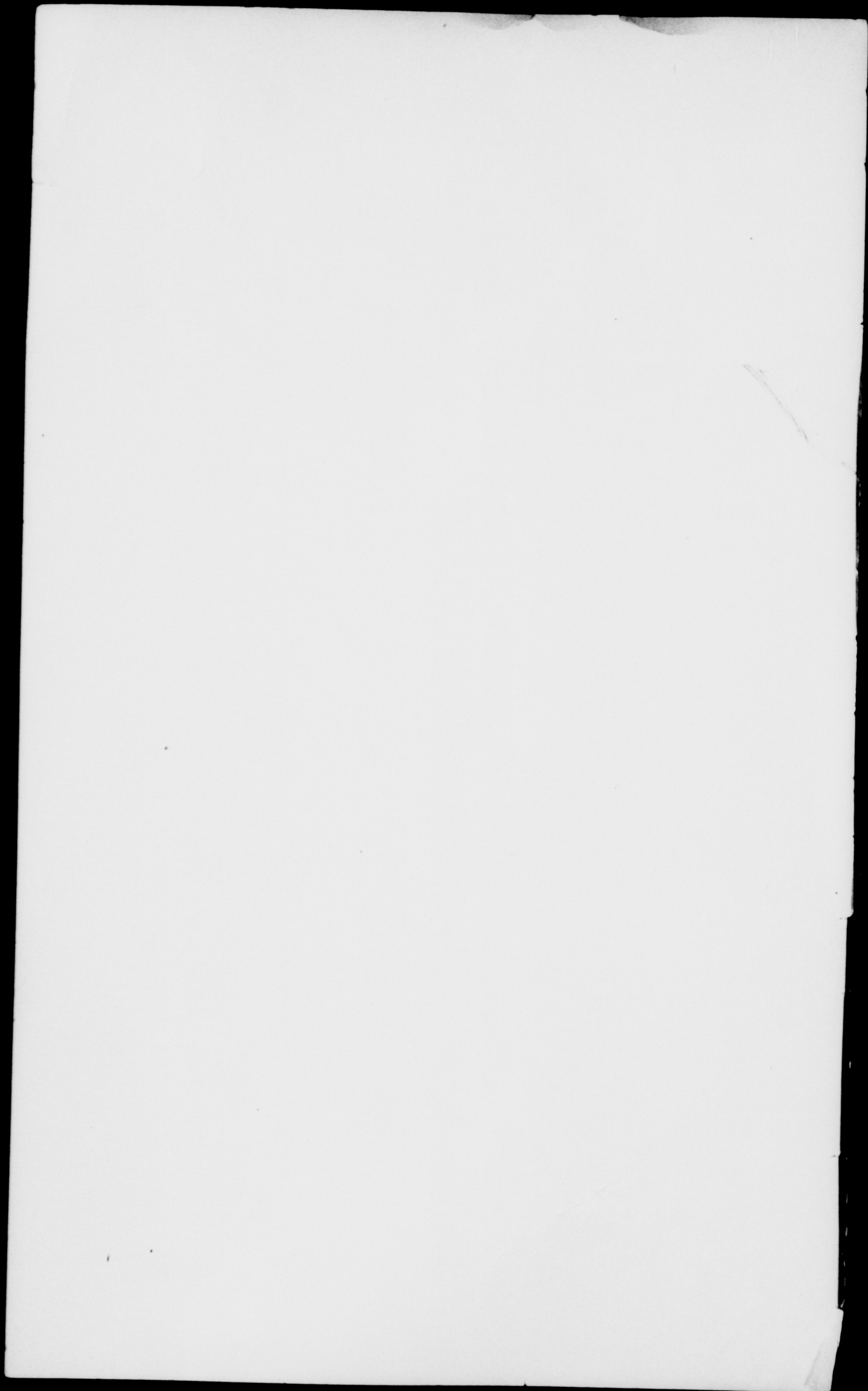
vs.

WALTER J. GREGORY.

SUPPLEMENTAL BRIEF FILED ON BEHALF OF
DEFENDANT IN ERROR.

JOHN HALL JONES,
A. S. WORTHINGTON,
Attorneys for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.



IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2119.

No. 6, SPECIAL CALENDAR.

DISTRICT OF COLUMBIA

vs.

WALTER J. GREGORY.

**SUPPLEMENTAL BRIEF FILED ON BEHALF OF
DEFENDANT IN ERROR.**

Under the facts set forth in the record of this case the holder of any of the trading stamps of the defendant in error would have the right to sue that company in his own name to compel performance by it of its contract for the redemption of its stamps.

Hendricks *vs.* Lindsay, 93 U. S., 143, 149.

Keller *vs.* Ashford, 133 U. S., 610.

25 L. R. A. 257, extended note.

It seems not to be disputed that Congress has no power to make it a criminal offense for a merchant, as an inducement to customers to deal with him for cash, to "throw in" a cigar or other article of small value; yet the language of the statute under which this prosecution was begun plainly undertakes to make criminal just such a transaction. And this unconstitutional provision it is impossible to separate from anything in the statute which Congress might have the power to enact if it stood by itself. Under repeated decisions in the Supreme Court of the United States the whole act therefore falls.

U. S. *vs.* Reese, 92 U. S., 214, 220.

Trade-mark cases, 100 U. S., 98, 99.

U. S. *vs.* Harris, 106 U. S., 629, 642.

Poindexter *vs.* Greenhow, 114 U. S., 270, 304.

Baldwin *vs.* Franks, 120 U. S., 678, 689.

As to *stare decisis*, see:

Bardin *vs.* N. P. R. Co., 154 U. S., 288, 321.

Kilbourn *vs.* Thompson, 103 U. S., 168, 196.

Counsel for plaintiff in error argues that the conditions set forth in the statement of facts, concerning the transferability of trading stamps, found on pages 5 and 9 of the agreed statement, are imposed for the purpose of limiting the number of stamps which will be presented for redemption, thereby increasing the profits of the company.

If the court will look at the following cases, it will be clearly seen for what purpose and with what effect the limitations and restrictions are imposed upon the stamps:

Sperry & Hutchinson Co. *vs.* Mechanics Clothing Co., 135 Fed., 833.

Sperry & Hutchinson Co. *vs.* Temple, 137 Fed., 992.

Sperry & Hutchinson Co. *vs.* Weber, 161 Fed., 219.

Sperry & Hutchinson Co. *vs.* Brady, 134 Fed., 691.

The above cases fully sustain the proposition that the retention of property in the stamps and their non-transferability (except with the consent of the company) is a legitimate and proper limitation.

In the Mechanics' Clothing Company case a merchant who had no right to the use of the stamps induced merchants who had such rights to transfer the stamps to him, in violation of contract, so that he might give them to his own customers, without compensation to the trading-stamp company therefor. This case is a splendid analysis of the triangular relationship existing between the trading-stamp company, the merchant, and his customers.

In the Temple case the Federal Court in Massachusetts restrained a trading-stamp broker from buying the company's stamps and selling them to merchants who had no contract relations with the company.

This able decision is valuable because the Federal Court distinctly states that the trading-stamp business is essentially legitimate and one which the courts ought to protect and one which the legislature has no right to obstruct, in that it gives to customers a discount on immediate payment for small purchases. The case follows the Mechanics' case, *supra*.

In the Weber case, Kohlsaas, J., restrained a rival trading-stamp concern from interfering with the business of the Sperry & Hutchinson Company by inducing customers of its subscribers to give plaintiff their stamps in exchange for defendant's.

The decision sets out in full the contract of the trading-stamp company and holds that the interference of the defendant constituted an actionable wrong, because the trading stamps of the company were issued subject to special limitations as to redemption and transferability.

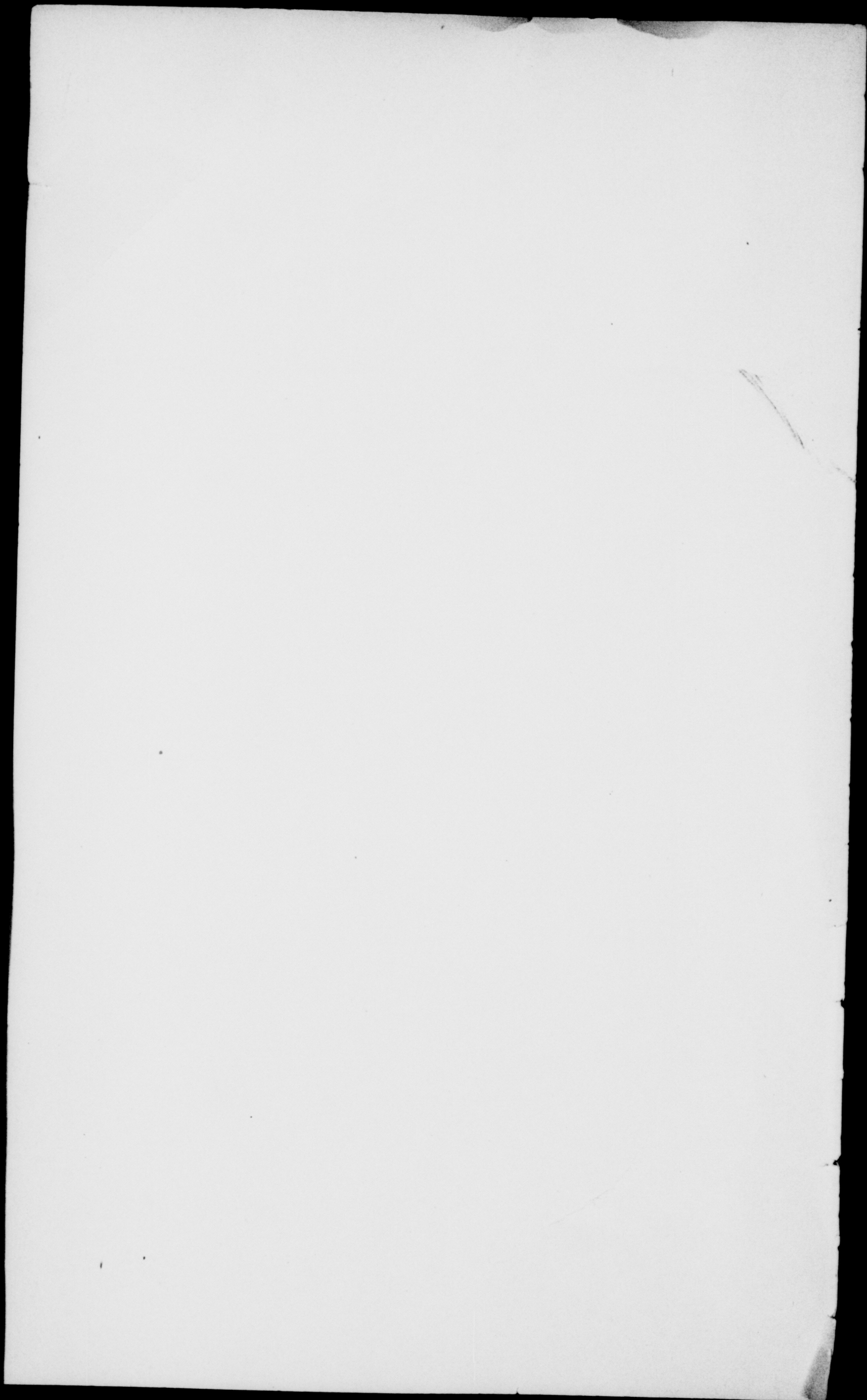
If the trading-stamp company did not limit the use of its stamps to its subscribers as an advertising medium, and all merchants might use them for advertising purposes, regardless of the rights of subscribers to the company, the business

of the company would be valueless to the subscribers. Many suits have been brought in the Federal courts resulting in injunctions of the above character, and in every suit brought the same arguments were made for the defendants as have been presented by counsel for the Government in this case, without, however, having the effect desired.

As to the Lansburgh decision: It is stated in the opinion in that case that the trading-stamp company forced itself upon merchants and obtained from them something for nothing. In the present case the contract in use expressly recites that the merchant-subscriber "desires to advertise his business and increase his cash trade by giving to his cash-paying customers a rebate or discount upon small payments in cash" (3). The contract further provides that the company "agrees to print and distribute throughout the city of Washington at least 50,000 directories containing the names, business and business addresses of the subscribers to this agreement." By the statement of facts it appears that the company "employs large numbers of canvassers who go from house to house in the District of Columbia and endeavor to induce householders to trade with and pay cash for purchases to the merchants who have entered into said contracts with said company and who leave with householders various advertising matter" (15).

This important distinction between the facts as found by the court in the Lansburgh case and the agreed facts in the present case, of itself deprives the decision in the Lansburgh case of any weight in the present hearing, even if it be assumed that nothing that was actually decided in that case is open to controversy now.

JOHN HALL JONES,
A. S. WORTHINGTON,
Attorneys for Defendant in Error.



COURT OF APPEALS,
DISTRICT OF COLUMBIA

FILED
APR 22 1910

IN *Henry W. Hodges,*

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2119.

No. 6, SPECIAL CALENDAR.

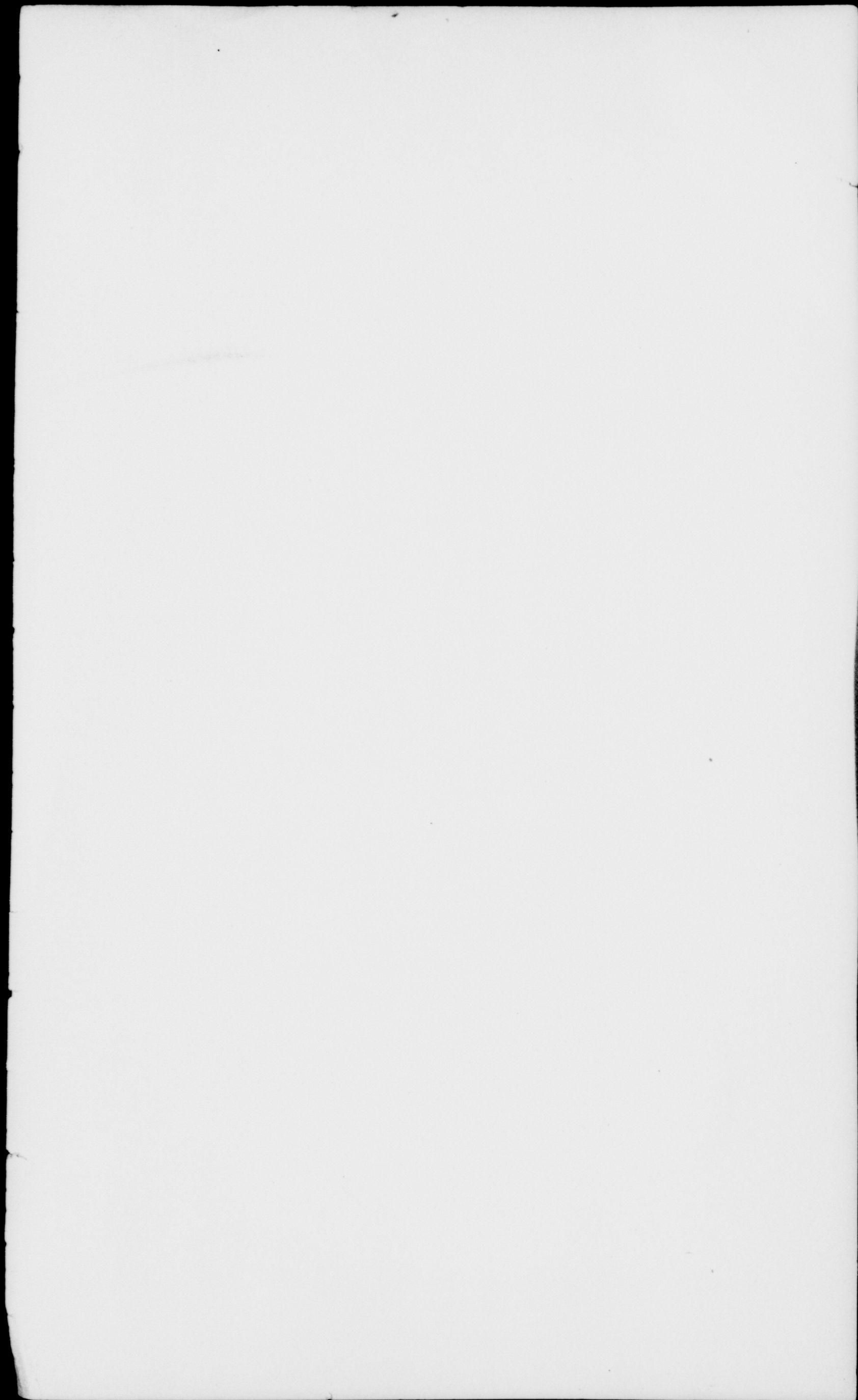
DISTRICT OF COLUMBIA

vs.

WALTER J. GREGORY.

REPLY ON BEHALF OF PLAINTIFF IN ERROR
TO DEFENDANT'S SUPPLEMENTAL BRIEF.

EDWARD H. THOMAS,
WILLIAM HENRY WHITE,
Attorneys for Plaintiff in Error.



IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2119.

No. 6, SPECIAL CALENDAR.

DISTRICT OF COLUMBIA

vs.

WALTER J. GREGORY.

**REPLY OF THE DISTRICT OF COLUMBIA TO
SUPPLEMENTAL BRIEF OF DEFENDANT IN
ERROR.**

The first proposition of the supplemental brief is:

“Under the facts set forth in the record of this case the holder of any of the trading stamps of the defendant in error would have the right to sue the company in his own name to compel performance by it of its contract for the redemption of the stamps.”

Hendricks *vs.* Lindsay, 93 U. S., 143, 149.

Keller *vs.* Ashford, 133 U. S., 610.

25 L. R. A., 257, extended note.

In *Hendricks vs. Lindsay* the court say (p. 149):

“If Hendricks engaged with Lindsay to indemnify the sureties furnished by him, and on the faith of this promise Lindsay and Mansfield executed the supersedeas bond, as we hold was the case here, then, if they suffered loss by reason of the breach of this contract, they are entitled to maintain this suit. That they did suffer loss, to the extent of Ballintine’s judgment against the company, which was affirmed in this court, is the legal effect of the evidence of the only witness on the point. He states directly that he and his co-plaintiff paid on the bond to Ballintine a certain amount of money, meaning evidently, on the judgment to secure which the bond was given.”

Here the agreement was to indemnify a surety, named in the agreement, and who became surety on the faith of the agreement. The case is construed in *Keller vs. Ashford*, next cited, which distinctly is to the effect that there is no *legal* remedy in the name of a third person not named in nor a party to the agreement. Certainly the merchant can sue on the contract, for he is a party to it; but his customer is not a party, is not named and has no right to sue at law except in the name of the merchant.

The cases reviewed in 25 L. R. A., note II, all so hold. So we say again, as upon the argument, that the collector of stamps would have to sue in the name of each merchant from whom he collects them. There is no privity between the collector and the stamp company.

In order to further understand this situation one must consider these conditions:

(a) There is no right upon the part of the merchant to have the stamps *in his hands* redeemed. His only right is to deliver custody (not title) to his customer.

(b) Title is reserved in the stamp company.

(c) There is neither contract nor privity between the stamp company and the customer.

(d) There is no contract between the merchant and the customer. In delivering custody of the stamp the merchant fully executes his contract and agrees to nothing, not even to allow suit to be entered in his name.

(e) The stamp company is not the bailee of the merchant. It is not his agent to pay money to the customer. Nothing is due from the merchant to his customer. The merchant has no fund on deposit with the stamp company. No order, check, draft, or other writing is given by the merchant to the customer upon which the merchant is liable, primarily or secondarily.

(f) If it be said that the stamp company is the agent of the merchant to advertise his business, one of the many answers is that the true conditions, as above shown, are not limited to that, and such relation is merely incidental.

The only satisfactory conclusion is the one announced in the *Lansburgh* case, that the stamp company is independently exploiting a cunning device with "necessary books and stamps and so-called premiums (and now cash and falcon pens) with which to operate it successfully"—not to act as agent or to represent buyer or seller "but to prey upon both."

Restricting redemption to stamps given out to customers by merchants under contract with the stamp company might or might not be objectionable; but here again the conditions are not limited to that. The actual restrictions in operation do prevent redemption of stamps by customers or merchants under contract, and that is the real purpose. But for this interweaving of the proper woof in the improper chain the

court would never have applied the terms "shrewdly planned" and "cunning" to the completed fabric.

In the same illusive class are the words in the contract that the merchant "desires (?) to advertise his business and increase his cash trade by *giving* to his cash-paying *customers a rebate or discount*" (page 4, Supplemental Brief), while at the same time putting restrictions upon their getting the "discount;" saying to the customer that the merchant charges you no more and admitting to the court that he *must* charge more, and so on.

"In order that we may not be misunderstood in the position which we feel compelled to take regarding the case before us, we deem it proper to say that we do not approve of the trading-stamp business * * * nor do we decide that it is not competent for the General Assembly to prohibit it." (State vs. Dalton, 22 R. I., 77, 91.)

Respectfully submitted,

EDWARD H. THOMAS,
WILLIAM HENRY WHITE,
Attorneys for Plaintiff in Error.

